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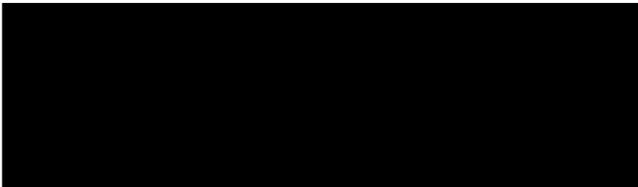


FILE: LIN 04 253 51735 Office: NEBRASKA SERVICE CENTER Date: JUL 05 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software development and consulting business that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition based on her determination that the record failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

When filing the Form I-129 petition, the petitioner averred that it employed 15 persons, provided computer software development and consulting services, and required the services of computer professionals to create, write, develop, and implement sophisticated application systems. In a September 9, 2004 letter submitted in support of the petition, the petitioner stated the specific job duties of the programmer analyst position included:

- i. Analyzing the communications, informational and programming requirements of clients; planning, developing[,] and designing business programs and computer systems;
- ii. Designing, programming[,] and implementing software applications and packages customized to meet specific client needs;

- iii. Reviewing, repairing[,] and modifying software programs to ensure technical accuracy and reliability of programs;
- iv. Training of clients on the use of software applications and providing trouble shooting and debugging support.

The Labor Condition Application (LCA) that the petitioner filed with the Department of Labor (DOL) listed the beneficiary's place of work as North Liberty, Iowa as a programmer analyst.

On February 3, 2005, the director requested additional evidence from the petitioner. The director noted that when the beneficiary is to work at client sites or on specific projects for clients, it is the contract or work order that determines the actual duties to be performed by the beneficiary. The director requested additional documentation to support the description of duties, such as, documentation entered into or issued by the petitioner's client(s) that establishes the actual duties to be performed, the contract between the petitioner and the client organization for whom the beneficiary will perform services, and the contract or work order, that lists the exact address where the beneficiary will be working.

In an April 22, 2005 response, counsel for the petitioner attached a copy of a sub-contractor agreement and work order indicating the beneficiary would provide computer consulting, programming and related services to the designated clients of Smart Insight and the beneficiary would work on the portal taxonomy project

The director denied the petition on May 27, 2005. The director noted the documentation submitted by the petitioner demonstrated the petitioner is an employment agency or consulting firm providing contract employees to other places of business. The director determined that the contract submitted did not provide any information about the business where the beneficiary would actually work and absent a contract with the actual employer stating the duties to be performed, CIS could not determine that the proffered position is a specialty occupation. The director determined that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel for the petitioner asserts: the position of programmer analyst qualifies as a specialty occupation; that the petitioner is the beneficiary's employer; that the beneficiary will be working on a portal taxonomy project that requires the beneficiary to perform highly sophisticated programming duties that would need substantial theoretical knowledge and insight into programming methodology and the architecture of advanced computer languages; and that an April 18, 2005 letter from Smart Insight, LLC describes the "portal taxonomy" project and the number of programmers necessary to complete the various stages of the project.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;

- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The AAO finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). However, the court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

Thus, when a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, Citizenship and Immigration Services (CIS) will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner initially provided a generic description of the types of duties the beneficiary would perform upon his employment with the petitioner, but no evidence that establishes the specific duties. A petitioner cannot establish employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the Department of Labor's *Occupational Outlook Handbook (Handbook)* in discussing an occupational title, e.g., a programmer writes programs; a computer system analyst designs and updates software; a computer software engineer designs, constructs, tests, and maintains computer applications software. Although the petitioner asserts that the beneficiary's duties would involve designing, programming, and implementing software of some type, the description does not prove that the beneficiary would perform as a programmer analyst. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

The AAO acknowledges the petitioner's response, to the director's RFE for the specific nature of the beneficiary's duties; however, a copy of a work order indicating the beneficiary would work on the "portal taxonomy" project is insufficient to enable CIS to determine that the duties involved in such a project are the duties of a specialty occupation.

The AAO also notes the letter submitted by Smart Insight, LLC, the beneficiary's ultimate employer, on appeal. However, the statements regarding the beneficiary's proposed work on a portal taxonomy project are vague and fail to provide a comprehensive understanding of the actual work involved. Moreover, the petitioner was put on notice of the required evidence regarding the beneficiary's ultimate employment and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner's failure to timely submit the requested evidence requires the AAO to discount even these general references as evidence on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).²

In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, or the petitioner's client's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a descriptive listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

² The AAO observes that the *Handbook* reports that there are many training paths available for programmers and that although bachelor's degrees are commonly required, certain jobs may require only a two-year degree or certificate; that most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of a variety of computer systems and technologies for positions of computer software engineer; and that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform a specialty occupation, as the record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.